



TC03404

Appeal number: TC/2013/04146 & TC/2013/09390

VAT – Penalties for late submission of EC Sales Lists - whether reasonable excuse – No – Appeal dismissed – Value Added Tax Act 1994, Sections 66, 70 and 71 – Value Added Tax Regulations 1995 Regulations 21 and 22.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SAMANTHA HOLMES

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE W RUTHVEN GEMMELL, WS
MRS CHARLOTTE BARBOUR, CA, CTA**

**Sitting in public at George House, 126 George Street, Edinburgh on
21 February 2014**

Samantha Holmes, the Appellant

Elizabeth McIntyre, Officer of HMRC, for the Respondents

DECISION

5 1. This is an appeal against a decision by the Commissioners for H M Revenue & Customs (“HMRC”) to issue penalties under VAT Act 1994 and VAT Regulations 1995 in respect of the late submission of EC Sales Lists (“ESL”) for the period 1 April 2012 to 30 June 2012 (06/12), 1 July 2012 to 30 September 2012 (09/12) and 1 October 2012 to 31 December 2012 (12/12) for £500, £860 and £660 respectively.

10 **Legislation**

Value Added Tax Act 1994 Sections 66, 70 and 71

Value Added Tax Regulations 1995 Regulations 21 and 22

Evidence and Findings of Fact

15 2. Samantha Jane Holmes (“SH”) carries on a business as a wholesaler and retailer of homewares and clothing and was registered as a sole proprietor for the purposes of VAT with effect from 2 January 2003.

3. SH sells goods to both domestic and overseas customers and only recently started to export to customers in Europe.

20 4. SH is required to submit an ESL to HMRC in respect of sales made to businesses who are registered for the equivalent of VAT in their country.

5. These lists are submitted on a calendar quarter basis unless the value of EC sales has exceeded £35,000 in the current or previous four quarters, in which case EC Sale Lists require to be submitted on a monthly basis.

25 6. The deadline for submitting an ESL is 21 days after the end of the period covered by the list, if submitting electronically, or 14 days after the end of the period, if submitting on paper. HMRC calculate penalties from 22 days after the end of the period.

30 7. On 13 January 2012, HMRC wrote to SH advising of a potential penalty in relation to the late submissions of the ESL in relation to the period 09/11, that is 1 July 2011 to 30 September 2011, which was due on 21 October 2011. This gave SH until 31 January 2012 to submit the outstanding ESL, after which a penalty of £5 per day from 1 February 2012 until the ESL was received, subject to a maximum amount of £500.

35 8. The 13 January 2012 letter said, in a box entitled “IMPORTANT”, “if you do not submit future ESLs on time, you will be issued with a penalty without any further notices being served, until there had been a clear 12 month period without default”. It continued to set out a number of questions and answers, including how the penalty was calculated which was on an increasing scale of penalty for first, second and

subsequent defaults at £5, £10 and £15 per day respectively and with maximum penalties of £500, £1,000 and £1,500, again, respectively. There was also a contact telephone number to use, “if you expect to have difficulties submitting your ESL on time.....”.

5 9. On 26 February 2013, HMRC wrote and notified SH of the issue of penalties for the failure to submit ESL by the due dates for the periods 06/12 and 09/12. The penalty notice for 12/12 was issued on 6 November 2013.

10 10. The penalties were calculated respectively as 100 days at £5, totalling £500, for 06/12, and 86 days at £10, totalling £860, for 09/12 and 44 days at £15, totalling £660 for 12/12.

11. In fact, the 06/12 ESL, submitted on 15 January 2013 was for 178 days after the due date of 21 July 2012 but the maximum number of days for a penalty is 100 days.

15 12. SH stated in her appeal that HMRC “have fined me for a small delay to report EC sales of £13,000 which I achieved during the period April to September 2012. I agree that HMRC must have rules in place to protect against EC VAT fraud but I believe the penalty in this case has been unfairly applied”.

20 13. SH explained that she was a small sole trading business and made a profit of £10,000 in 2012. The penalty represented nearly 14% of her annual profits; her business was seasonal and in the crucial trading period which is September to December, she was having difficulty “staying afloat” in difficult economic times and retaining two members of staff. “As a result I did not manage to submit my report ending 09/12 until January 2013.”

25 14. She stated that she had been warned of the penalty but had only one communication from HMRC which explained how the penalties were calculated. SH says that HMRC had incurred no financial loss and did receive these reports and said “I do not owe any tax and have never failed to submit ordinary VAT returns on time”.

15. SH said her views were supported by her MEP, Struan Stevenson, and her MP, Alan Reid.

30 16. On 7 March 2013, SH wrote to HMRC requesting that the decision to issue the penalties be reviewed but, whereas SH agreed with HMRC’s need to have tight controls, she stated that she had not made ESL returns a “necessary priority” and apologised. SH asked for clemency and stated “had I realised the penalty was so high, I would have submitted the forms to you sooner”. SH also said it was disproportionate to the crime and noted that she had submitted her ESL for the period 35 12/12 on 6 March 2013 and asked that the charge in respect of this should be waived.

40 17. On 13 March 2013, HMRC wrote to SH advising her of the outcome of the review and upholding the penalties. The letter pointed out the issuance of the Penalty Liability Notice on 13 January 2012, the “Important Note” it contained and the further notes on how the penalty was calculated. The letter stated that the amount of the fine was not a valid reason not to submit the ESL on time and that subsequent notices

following on from an initial penalty liability notice are not sent as the onus is on the tax payer to comply.

18. On 25 March 2013, SH wrote to HMRC saying “I was not seeking for HMRC to excuse me from my failure to read HMRC’s penalty warning letter, I was appealing for clemency on the grounds that I am a small trader and the fine I am being asked to pay is draconian”. A further appeal was requested.

19. HMRC provided a further and independent review on 16 May 2013 again upholding the decision. Again this referred to the Penalty Liability Notice issued on 13 January 2012 and made reference to the Public Notice 725 and the obligation on ‘all tax payers to submit ESLs by the due date’.

20. HMRC referred to Section 66 of the VATA 1994 and advised that HMRC does what it can to assist businesses that are having trouble paying.

21. An example of a VAT ESL form was submitted to the Tribunal as well as the February 2011 and October 2012 versions of “Notice 725-The Single Market”.

22. SH appealed to the Tribunal.

23. There was no internal revenue appeal in relation to the 12/12 penalty but it was included in the appeal to the Tribunal.

HMRC’s Submissions

24. HMRC say that the legislation is clear and that the warning letter sent on 13 January 2012 was also clear and spelt out the penalties that would be applicable. Similarly, they point to the provisions of Notice 725, in particular, paragraphs 17.3 to 17.12; with the latter setting out the penalties if a tax payer “fails to submit the ESL, sends it late, or makes mistakes”. It was noted that there were no relevant changes between the February 2011 and the October 2012 versions of Notice 725 as they applied to the circumstances of this appeal.

25. HMRC say that there was no dispute that the ESLs were late and there was no dispute over the number of days that they were late.

26. HMRC refer to Section 66 of VATA 1994 which sets out the basis for making the default penalties and say there was no dispute that the penalties were correctly calculated in terms of the legislation.

27. They refer, in particular, to Section 66(2)(d) which states that ‘the person will become liable, without any further notices being served under this section to penalties under this section, if he commits any more defaults before a period of 12 months has elapsed without his being in default’.

28. HMRC refer to Section 66(7)(a) and (b) in relation to when a tax payer may not be liable to a penalty and to Section 70 VATA which provides no mitigation of a penalty under Section 66. Section 71 VATA, which in relation to defining reasonable

excuse for any conduct, says (a) an insufficiency of funds to pay any VAT due is not a reasonable excuse and, (b) where reliance is placed on any other person to perform any task, neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of the person relied upon, is a reasonable excuse.

5 Submissions for SH

29. SH says that she is a small sole trading business which started in 2003 involving designing and selling clothing and is a business which provides income for others. Export activity is a new part of her business and grew significantly. SH says that a penalty of £2,020 for failure to report ESL of £34,000 is excessive and, whilst she
10 accepts that HMRC has rules, feels in this matter they have been applied in a uniquely unfair way.

30. In support of this, SH says that the purpose of Section 66 VATA is to punish businesses who do not make ESLs and who repeatedly do not make ESLs. SH says this is not relevant in her case as she had no opportunity to learn from her first error
15 on the grounds that her first and second late ESLs were returned late, at the same time. SH was, she says, penalised immediately for both and if she had received the £500 fine at the outset it would have acted as an incentive not to make any further late ESL returns. Instead she was fined £500 and £860 simultaneously.

31. SH accepts that she knew the third fine for 12/12 was coming and asked for it to be waived but states that she did not receive notice of this until some nine months
20 later. SH says the penalties are not for late payment of tax and that there has been no loss of revenue to HMRC.

32. SH says that HMRC's communication about penalties is inadequate. Although the Penalty Liability Notice letter is clear, with the benefit of hindsight, it was sent
25 only once, in January 2012.

33. SH says that HMRC have a duplicitous method of extracting penalties and in her case resulted in her receiving a threatening demand notice to pay overdue VAT which was in fact not VAT but the penalty. No documents were produced at the
30 Tribunal but HMRC say that this would have come from HMRC's Debt Management Office.

34. SH says that HMRC made it difficult to find out about the payment of the overdue VAT because the telephone numbers were incorrect. It was clarified during the hearing that the telephone numbers referred to in the Penalty Liability Notice letter of 13 January 2012 were not used by SH.

35. SH says she recorded all her EC sales on her VAT return and was simply late in providing the detailed information in the ESL and to some extent HMRC was only aware of the lack of ESL because SH had completed her VAT return correctly.

36. SH advised that she had technical difficulties in obtaining the information but had now done so and had since submitted all ESL returns correctly and on time. SH
40 says that there was no loss to HMRC, that her concerns are supported by her Member

of the European Parliament and Member of Parliament; that the application and the penalties are unduly draconian; that as the first and second penalties arose through them being submitted at the same time, so she had no prior or first warning although SH accepts that she knew in March 2012 that the third penalty was due and asked for this to be waived.

Decision

37. The Tribunal were sympathetic to the submissions put forward by SH. The penalties were large in relation to her profits; she had only received one warning letter; and the incidence of her submissions of the ESLs meant that she did not receive one penalty then another as she might have expected to do on her analysis of the purpose behind the legislation.

38. The Tribunal noted the comments from her Member of the European Parliament and the support of her Member of Parliament noting also that it is these parliaments that create the taxation laws which are the subject of this and all appeals.

39. The facts in this case were not in dispute; the ESLs were late, the days were correctly calculated in terms of the legislation to produce accurate amounts of penalty, and both in her appeal to the Tribunal and at the Tribunal hearing SH put forward no reasonable excuse.

40. The appeal was on the grounds of the penalties being unfairly applied and a request for a reduction on the grounds of clemency or for a penalty to be waived.

41. Section 66(2) (d) is, however, clear that the tax payer becomes liable, “*without any further notices being served under this section* (emphasis added) to penalties under this section if he commits any more defaults before a period of 12 months has elapsed without his being in default”.

42. HMRC, were, therefore, entitled to send only one notice within the period of defaults under appeal as they were all consecutive periods within the one 12 month period. Notwithstanding this, the Tribunal believe that it would be no doubt appreciated by tax payers in the same position as SH, if further reminders were issued as HMRC have done with the penalties due on other taxes, even though the legislation does not actually require them to do so.

43. The legislation only allows the penalties to be mitigated or removed if there is a reasonable excuse and Paragraph 17.13 Notice 725 sets out HMRC’s understanding of what they mean by reasonable excuse.

44. It says “genuine mistakes, honest and acting in good faith are not accepted as reasonable excuses for penalty purposes”.

45. SH stated that she did not give the ESL requirement “necessary priority” and thereafter the legislation took its course and whilst it may be an unforeseen circumstance that by missing two quarterly returns and submitting them at the same time results in the tax payer moving from the first stage penalty to the second stage

simultaneously that is, nonetheless, the legislative provision. In this case SH was subject to this and received only the first initial warning but the legislation does not provide that a second warning needs to be given after the first infringement within a 12 month period.

5 46. The letter of 13 January 2012 was also quite clear about the ratchet effect of the penalties. It was explained to SH at the hearing that in the absence of proving a reasonable excuse, the only issues put forward to the Tribunal were ones of fairness and it was explained following the decision of the Upper Tribunal, whose decisions are binding on the First-tier Tribunal, in *HMRC v Hok Ltd* (2102) UKUT 363 that it is
10 explicit in paragraph 58 that the First-tier Tribunal does not have the jurisdiction to discharge penalties on the ground that the imposition was unfair.

47. In these circumstances the Tribunal has no alternative but to consider that there was no reasonable excuse that was offered for the failure to submit the ESLs by the due dates, that SH acted *honestly and in good faith* but made a mistake in not making
15 the submission of ESLs a necessary priority and as the issue of fairness cannot be considered then the appeal must be dismissed.

48. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later
20 than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**W RUTHVEN GEMMELL
TRIBUNAL JUDGE**

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RELEASE DATE: 13 March 2014